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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-849

SMITH'S FOOD KING, a corporation,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Respondent, Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO, an unincorporated association, respectfully prays that the Petition for Writ of Certiorari herein be denied.

Opinion Below.

The opinion of the United States Court of Appeals, Ninth Circuit, which is not yet officially reported, is printed in the Appendix to the petition herein.

Question Presented.

The only question raised by the petition is what standard should be applied to determine if a case has become moot in a situation where the underlying labor dispute between the parties has long since been conclusively determined.

Statement of the Case.

Petitioner, Smith's Food King, owner and operator of a chain of retail grocery stores, and Respondent, Retail Clerks Union, Local 1442, an unincorporated labor association, are parties to a written collective bargaining agreement providing for and establishing wages, hours, benefits and other working conditions for retail clerks employed by Petitioner (R. 188-189).

In 1975, a dispute arose between the parties concerning performance of bargaining unit work by non-bargaining unit personnel. More specifically, employees of employers other than Petitioner, i.e., drivers or salesman of suppliers, were performing work in Petitioner's stores, which work belongs to retail clerks who are covered by this agreement (R. 190). This dispute was submitted to arbitration, and on October 27, 1976, Arbitrator Frederic Meyers rendered an award upholding the Union's grievance (R. 190).

In January of 1977, Respondent filed a petition to confirm that award in the Superior Court of California, County of Los Angeles (R. 190). On March 21, 1977, the State Superior Court entered an order granting the petition to confirm, and on May 20, 1977, that court entered a judgment in accordance therewith (R. 191). Petitioner appealed that judgment to the California Court of Appeal (R. 62). On October

3, 1978, while the instant matter was on appeal to the Ninth Circuit, the State Appellate Court modified the Superior Court judgment and affirmed as modified. The text of that order is set forth in the Appendix hereto. No appeal was filed by either party with respect to that order.

On or about June 16, 1977, which was after the State court judgment had been entered, but before any appeal was filed with the State Appellate Court, the President of Retail Clerks Union, Local 1442, informed Petitioner in writing of the possibility of economic action in the event that Petitioner continued to fail and refuse to abide by the arbitration award (R. 191). The possibility of concerted economic action was initiated pursuant to the specific exception to the no strike clause of the collective bargaining agreement in a situation where the employer fails to abide by an arbitration award, Article XIV, Paragraph D, Section 2 (R. 39).

On June 21, 1977, Petitioner filed in the Superior Court, State of California, County of Los Angeles, a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and for Specific Performance of Agreement to Arbitrate. On that same date, Petitioner sought a temporary restraining order, and following an ex parte hearing, no restraining order was issued. The matter was set for an order to show cause (R. 191-192). Prior to the hearing on the order to show cause, Respondent removed that case to the United States District Court, Central District of California. The District Court denied Petitioner's Motion for Preliminary Injunction and granted Respondent's Motion to Dismiss (R. 182-183).

The United States Court of Appeals for the Ninth Circuit dismissed Petitioner's appeal from that order as moot, holding:

> "The grievance, the arbitration, and the threatened strike have all been resolved and no decision of this court could alter the rights of any party. The case does not fall within the guidelines of *Amalgamated Transit Union, Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237, 1238 n.1 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977)." (Appendix to Petition for Writ of Certiorari).

The United States Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing (Supplemental Appendix to Petition for Writ of Certiorari, page 1).

REASONS FOR DENYING THE WRIT.

The instant Petition arises out of Petitioner's desire to obtain an advisory opinion from an arbitrator as to the rights, in the abstract, of the parties to the collective bargaining agreement with respect to the scope of the no-strike clause.

It is undisputed that no strike threat currently exists or has existed for an extended period of time, in that the very dispute which led to the possibility of economic action initially was conclusively resolved by the California Court of Appeal in October, 1978. As Petitioner candidly acknowledges, there is simply no dispute of any sort remaining between the parties (Petition for Writ of Certiorari, page 9). In these circumstances, as will be demonstrated more fully below, it is clearly frivolous to suggest, as does Petitioner, that the Ninth Circuit erred in declaring the case moot.

The exclusive contention in the petition is that the Ninth Circuit applied the "wrong standard" in determining that this case is moot. The petition does not cite a single case in support of this contention and, perplexingly, does not even suggest with any clarity what standard properly should have been applied by the Court below.

The standard for determining whether a case is moot is not so mysterious. As stated in *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705 (1973), "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." Where no actual controversy exists at such stages, the

dispute must be "capable of repetition, yet evading review." *Roe v. Wade, supra,* quoting *Southern Pacific Terminal Co. v. I.C.C.,* 219 U.S. 498, 515, 31 S.Ct. 279 (1911).

The Petition admits that no dispute has existed between the parties during any stage of appellate review (Petition for Writ of Certiorari, pages 7-8, 9). Likewise, there is not a scintilla of evidence, and the Petitioner does not allege, that the Union has renewed the strike threat or even intimated that such strike threat may be renewed. And it would be absurd to suggest that the Union may do so in the future, both because the California Court of Appeal has fully resolved the dispute which allegedly compelled Smith's to demand arbitration and because Smith's has fully complied with the judgment of the Los Angeles Superior Court and the award of Arbitrator Meyers. Further, there is no claim that any affiliated Union has threatened to strike any employer in the industry over this or any similar issue at any time before or after the instant dispute arose.

What, then, is the Petitioner seeking? A review of the Petition reveals that Petitioner is disguising as an arbitrable dispute its wish to secure a purely advisory opinion regarding an issue about which there is, at best, only an abstract academic, disagreement. Instead of arguing that the dispute herein is unresolved and not moot, Petitioner advances the novel theory (for which it cites no case or statutory authority) that arbitration should be "available to this and other employers to provide declaratory and interpretive statements of collective bargaining agreements, even where a particular dispute is resolved. . . ." (Petition for

Writ of Certiorari, page 9.) Stripped of rhetoric, Petitioner is arguing that, as a matter of law, a labor dispute is not moot, even if no actual controversy exists, if an employer happens to desire an advisory interpretation of the meaning of the contract. This argument, in addition to being simply preposterous, was never raised by Petitioner at any stage of this proceeding.

To justify its position that it has an absolute right to seek advisory arbitral opinions, Petitioner argues that a holding to the effect that the Union need not arbitrate the issue of the scope of the no-strike clause would fly in the face of "strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties", in the language of *Buffalo Forge v. United Steelworkers of America,* 428 U.S. 397, 407, 96 S.Ct. 3141, 3147 (1976). This argument is astonishingly hypocritical. Such a position would likely precipitate an endless cycle of abstract arbitrations and would clearly frustrate not only the grievance and arbitration machinery in the collective bargaining agreement, but also the strong national policy in favor of arbitration as a means of resolving labor disputes.

Of course, it is also clear that Petitioner's argument on this point is irrelevant and unpersuasive with respect to the issue of mootness, which is the only issue raised herein and, in addition, serves only to accentuate the weakness of Petitioner's position. As the District Court stated in its findings (R. 192-193; 193-194):

> "3. The narrow exception to the Norris-LaGuardia Act prohibition against injunctions in labor disputes carved out by the United States Supreme Court in *Boys Markets, Inc. v. Retail*

Clerks Union, Local 770, 398 U.S. 235 (1970) does not apply to the case at bar. The essence of the *Boys Markets* exception and the key to the issuance of a Boys Markets injunction is a finding that the issue underlying the work stoppage is subject to the arbitration clause of the applicable agreement and that a party to that agreement undermines the effectiveness of the arbitration machinery by engaging in the work stoppage and thereby forces the grievance to be resolved by economic pressure and not by the reasoned decision of an arbitrator for which the parties have bargained. These factors are not present in this case, in that the dispute underlying the threatened work stoppage here, i.e., the Plaintiff's failure to abide by the arbitration award, is not even remotely subject to the arbitration procedure."

. . .

"5. In the instant case, the parties have already, by mutual consent, gone through the arbitration process and the award of the arbitrator has been confirmed by the Superior Court of California for the County of Los Angeles and thereby converted into a judgment. The Union has done what it is required of it under the agreement to peacefully resolve the controversy. The application by Defendant to confirm the award of Frederic Meyers is not part of the arbitration proceeding; there is no issue now ripe for arbitration, and with arbitration now complete, the Union has turned to various other methods to compel compliance with that award. *State of New York v. Local 144,* 410 F.Supp. 225 (S.D.N.Y. 1976).

A work stoppage or threat of such work stoppage is, under the circumstances presented herein, entirely lawful under the collective bargaining agreement and the applicable law."

Conclusion.

For each of the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari herein should be denied.

DATED: December 27, 1979

Respectfully submitted,

ROBERT W. GILBERT,

Counsel for Respondent, Retail Clerks Union, Local 1442, Retail Clerks International Association, AFL-CIO.

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GILBERT (ADD) 37273 TAPE 1 LH 12-28

APPENDIX.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

RETAIL CLERKS UNION, Petitioner and Respondent, v. FOOD EMPLOYERS COUNCIL, etc., et al., Appellants. 2 Civ. No. 52343 (Super. Ct. No. C-188,844).

Filed Oct. 3, 1978.

APPEAL from a judgment of the Superior Court, Los Angeles County. George M. Dell, Judge. Modified and affirmed.

McLaughlin & Irvin, Timothy F. Ryan and Steven R. Feldstein for Appellant Smith Food Markets.

Robert W. Gilbert, a Law Corporation, Robert W. Gilbert and Ronald J. Cooke for Petitioner and Respondent Union.

This is a companion case to *Retail Clerks Union v. Food Employers Council*, Civ. No. 52312, which we have decided by an opinion filed concurrently herewith. It involves the same underlying collective bargaining agreement and the same contentions as we dealt with in that case. For the reasons discussed in that opinion, the judgment in this case must be modified.

There is one factual difference between the present case and the other case. In the case at bench, there were four violations within the six-month period after a warning notice. Applying the increased damage provision which we held to be illegal in the other opinion, the arbitrator awarded the total sum of $729.72. Using the figures set forth in the record, a legal award would have been only $24.54. ($6.1345 x 4.) We modify the judgment accordingly.

The judgment is modified by substituting the figure $24.54 for the figure $729.72 set forth therein; as so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

KINGSLEY, *Acting P.J.*

We concur:

JEFFERSON (Bernard), *J.*

ALARCON, *J.*